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FILED
DEC 15 19
MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

NO. 72-895

Petitioner: VERA RIVERA

vs.

Respondent: UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VERA RIVERA
Counsel Pro Se

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1. The inflexibility of the previous interpretation of this rule regarding timely filing of notice of appeal is unduly harsh, where the distance from the place of residence of the defendant and the place of practice of her counsel to the office of the clerk of court in which the notice is to be filed is considerable, and the appeal otherwise is well taken.	
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CITATIONS

U. S. v. Robinson, 361 U. S. 220.

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vs.

RESPONDENT: UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, VERA RIVERA, respectfully prays that a writ of certiorari issue to review the order dismissing appeal made and entered by the United States Court of Appeals for the Ninth Circuit on November 15, 1972.

OPINION BELOW

A copy of the Order Dismissing Appeal appears in the appendix hereto. No opinion was rendered by the District Court for the Southern District of California.

JURISDICTION

The Order Dismissing Appeal was entered, by the Court of Appeal for the Ninth Circuit on November 15, 1972. This court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the distance from the place of residence of the defendant and his counsel should be considered in computing the time for filing notice of appeal where the mailing occured within the time for filing said notice and where the appeal is otherwise well taken.

STATUTORY PROVISIONS INVOLVED

Rules 4(b) and 26(a) Federal Rules of Appellate Procedure, 28 United States Code.

STATEMENT OF THE CASE

Petitioner, after a jury trial was found guilty of nine (9) counts of smuggling aliens, in violation of Title 8 U.S.C. Section 1324, a Felony. A presentence report was ordered and probation/sentencing was set for April 19, 1971.

On April 19, 1971, by motion of petitioner's counsel, probation/sentencing was continued for purpose of filing motions for a new trial and further proceedings. Probation/sentencing was thereafter continued numerous times.

On January 31, 1972, petitioner's motion for new trial was denied; however, petitioner's motion to be sentenced to

the lesser included offense was granted. As a result, petitioner was sentenced under Title 18 U.S.C. Section 2 and Title 8 U.S.C. Section 1325, a misdemeanor notwithstanding the jury verdict of guilty of violation of Title 8 U.S.C. Section 1324, a Felony. The sentence was imposed on said date, but stayed pending filing of a motion to reduce sentence.

On February 24, 1972, petitioner's motion to reduce sentence was heard and granted. Petitioner was thereupon sentenced.

On April 3, 1972, petitioner moved for permission to file late notice of appeal pursuant to Rule 4, Federal Rules of Appellate Procedure. On said date the motion was denied. The Order denying the motion was docketed on the same day.

On April 13, 1972, petitioner's notice of appeal was deposited in the regular United States mail in Los Angeles, registered mail, return receipt requested, properly addressed to the Clerk of the United States District Court, Southern District of California. The notice of appeal was subsequently stamped "filed April 14, 1972, Clerk United States District Court....."

After other matters were timely dealt with, and argument on appeal before the United States Court of Appeal was heard, the United States Court of Appeal for the Ninth Circuit filed an Order dismissing appeal on November 15, 1972, from which order this appeal is attempted.

REASON FOR GRANTING THE WRIT

The inflexibility of the previous interpretations of the Rule regarding timely filing of notice of appeal is unduly harsh and therefore inimical to judicial fairness, where the distance from the place of residence of the defendant and her counsel to the office of the Clerk of the appropriate court is considerable and the appeal is otherwise well taken. In such cases deposit in the United States mail postage prepaid should suffice.

In U. S. v. Robinson, 361 U.S. 220, this court reiterated the clear position of this court that timely filing of notice of appeal is not only mandatory but jurisdictional. U.S. v. Robinson, supra., at page 229. Other decisions of this court have made the point that filing does not occur until

the clerk puts his paws on it, a fixed position inconsistent with logical requirements of due notice - almost pedantic.

With the sometimes national reach of some federal trial courts defendants are sometimes called upon to answer charges far from home and familiar counsel. Disregard of the inconvenience of personal delivery unfairly penalizes the distance respondents while giving precious additional time to those often fortuitously nearby. Moreover, the penalty is unnecessary.

The necessity for the rigidity is contrived from a fictional premise that order for order's sake is the better system even if that involves a blind disregard of the substantive merits of the cause. Matters of procedure take

precedence over the equities of the matter. Those fortunate enough to be in the city where a given clerk for a given court is located have a one-to-three day time advantage over more distant and, thanks to the inequitable effect of the filing rule, less fortunate parties. Such a rule deserves thorough going review in light of the speed of communication.

The merits of the case at bar commends itself to the point attempted. Incorporated herein is the argument of appellant below, petitioner herein contained in appellant's opening brief on appeal. A copy of that argument is appended hereto.

CONCLUSION

The rule that filing notice of appeal must be accomplished by delivery into the possession of the clerk should be

modified only in the respect that when intercity transportation of the notice of appeal is required due to distance from the place of residence of defendant's counsel to the clerk of the particular court, deposit in the United States mail by registered or certified mail properly addressed to the clerk of the court, postage prepaid, should suffice so long as the deposit is made within the time permitted for filing. The depositor would assume the responsibility for proof of timely deposit.

For the reason previously advanced, a writ of certiorari should issue to review the order dismissing appeal of the United States Court of Appeal for the Ninth Circuit.

Respectfully submitted,

Vera Rivera

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of December, 1972, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to:

Harry D. Steward
United States Attorney

Stephen G. Nelson
Assistant U. S. Attorney
Chief, Criminal Division

Douglas G. Hendricks
Assistant U. S. Attorney

325 West F Street
San Diego, California 92101

Attorneys for Respondent
United States of America

I further certify that all parties required to be served have been served.

HENRY WILLIAM SANDS
Attorney for Counsel

SUBSCRIBED and SWORN to before me this 12th day of December, 1972.

Ruby Mullen

OFFICIAL SEAL
RUBY MULLEN
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires Feb. 13, 1976

895 FILE COPY

DEC 15 1972

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

NO. 72-895

Petitioner: VERA RIVERA

vs.

Respondent: UNITED STATES OF AMERICA

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VERA RIVERA
Counsel Pro Se

I. MINUTES OF THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA HEARING ON MOTION TO FILE LATE NOTICE OF APPEAL DENIED APRIL 3, 1972 Exhibit A

II. UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ORDER DISMISSING APPEAL NOVEMBER 15, 1972 Exhibit B

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December, 1972, three copies of the Petition for Writ of Certiorari and Appendix thereto were mailed, postage prepaid, to:

Solicitor General of the
United States, Department
of Justice
Washington, D. C.

I further certify that all parties required to be served have been served.

HENRY WILLIAM SANDS
Attorney of Counsel

SUBSCRIBED and SWORN to before me this 15th day of December, 1972.

OFFICIAL SEAL
RUBY MULLEN
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires Feb. 13, 1976

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-895

VERA RIVERA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of California in March 1971 petitioner and her husband, John Rivera, were convicted on nine counts of an indictment charging them with smuggling aliens into the United States in violation of 8 U.S.C. 1324.

On January 31, 1972, the district court denied petitioner's motion for a new trial, but granted her motion to be sentenced under the lesser included offense of aiding and abetting the illegal entry of aliens in violation of 8 U.S.C. 1325.[1] The district court, there-

[1] This statute provides for punishment of imprisonment for not more than six months and a fine of not more than $500 for a first offender, and subjects a subsequent offender to a harsher

upon sentenced petitioner to concurrent six-month terms of imprisonment on each of nine counts. After imposing sentence, the court advised petitioner of her right to appeal and petitioner waived an appeal.[2] Execution of the sentence was stayed for a period of three weeks. Thereafter, on February 24, following the filing of a motion to reduce the sentence, the court suspended the sentence and placed petitioner on probation for a period of three years.

On March 10, petitioner filed a request to file a late notice of appeal. On April 3, 1972, the district court denied the motion, and on April 14, 1972, petitioner filed a notice of appeal. On November 15, 1972, the court of appeals dismissed the appeal as untimely.

The dismissal of the appeal was clearly proper. Petitioner not only filed an untimely notice of appeal from the judgment of conviction, but also failed to file a timely notice from the order denying her leave to file a late appeal. As the court below found, the filing of a timely notice of appeal is jurisdictional. Rule 4(b) and 26(b) Fed. R. App. P. Nor does anything that petitioner asserts suggest excusable neglect.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1973.

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penalty. The felony statute, under which petitioner had been convicted, carries a penalty of imprisonment of not more than five years and a fine not exceeding $2,000 for each alien in respect to whom any violation occurs.

[2] At this proceeding the indictment against petitioner's husband, who had been committed for incompetency subsequent to the jury verdict, was dismissed.

U.S. GOVERNMENT PRINTING OFFICE: 1973